No. 78-1187

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGIL P. MILLER, *Petitioner*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

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INDEX

page

Opinions of the Courts Below 2

Statement of Jurisdictional Grounds 3

Questions Presented 4

Statutes Involved 6

Statement of the Case 6

Reasons for Granting the Writ 9

1. The state court denied Petitioner a right specially set up and claimed by him under the FELA, namely, the right to have his case submitted to a jury on the theory that Respondent failed to use ordinary care to furnish Petitioner a reasonably safe place in which to work 9

   a. Argument supporting the reasons for granting the writ 11

2. The state court narrowed the concept of proximate cause under the Federal Employers' Liability Act 18

Prayer 19

Appendix A: Judgment of the 153rd Judicial District Court of Tarrant County, Texas A-1

Appendix B: Judgment, order and opinion of the Court of Civil Appeals for the Second Supreme Judicial District of Texas A-3

Appendix C: Orders on the application for writ of error and motion for rehearing of the application for writ of error of the Texas Supreme Court A-15

Appendix D: (28 U.S.C. §1257) A-17

Appendix E: (45 U.S.C. §51) A-18

TABLE OF AUTHORITIES

Cases: Page

Bailey v. Central Vermont Ry., 319 U.S. 350 (1943) 11, 12, 13

Griswold v. Gardner, 155 F.2d 333 (6th Cir. 1946, Cert. den. 329 U.S. 725) 17

Lavender v. Kurn, 327 U.S. 645 (1946) 15

Rogers v. Missouri Pacific R. C., 353 U.S. 500 (1957) 14

Southern Ry. v. Wood, 171 So.2d 614 (Fla. 1965) 17

Tennant, Admx. v. Peoria & P.U. Railway Co., 321 U.S. 35 (1944) 14

Wilkerson v. McCarthy, 336 U.S. 53 (1949) 14

Statutes, Codes, Rules:

28 U.S.C. §1257 ..... 3, 6, A-17

45 U.S.C. §51, et seq. 3, 4, 6, A-18

TEX. R. CIV. P. 506,515-17 3

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGIL P. MILLER, *Petitioner*

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Petition for Writ of Certiorari to the Supreme Court of Texas

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Supreme Court of Texas in the above numbered and styled cause.

Under the guise of state procedural rules, this Petitioner has been denied a substantial right specially set up and claimed by him under the Federal Employers Liability Act, namely, the right to have his cause submited to a jury. Petitioner, while admittedly employed by Respondent in interstate commerce, was injured as a result of Respondent's negligence in failing to use ordinary care to furnish Petitioner a reasonably safe place in which to work. The trial court submitted the injury question to the jury which found in favor of Petitioner but refused to submit

the issue of unsafe place to work. By reason of this state court action;

(a) The state court usurped the function of the jury and applied the wrong standard in deciding that Respondent's actions and omissions could not be termed negligence.

(b) The state court usurped the function of the jury in deciding as a mater of law that Petitioner's injuries were unrelated to the negligence of Respondent, and;

(c) The state court narrowed the concept of "proximate causation" under the Federal Employers Liability Act.

In this behalf, Petitioner shows unto the Court:

OPINIONS OF THE COURTS BELOW

The judgment of the 153rd Judicial District Court of Tarrant County, Texas denying judgment to this Petitioner is printed in Appendix A herein. The judgment and opinion of the Court of Civil Appeals for the second Supreme Judicial District of Texas affirming the trial court's judgment is printed in Appendix B, herein. Petitioner's application for writ of error and motion for rehearing of application for writ of error were refused ("no reversible error") by the Supreme Court of Texas, which orders are set out in Appendix C, herein. The opinion of the Court of Civil Appeals is not reported nor did the Supreme Court of Texas publish an opinion or give an opinion in regard to this cause.

STATEMENT OF JURISDICTIONAL GROUNDS

The jurisdiction of this court is based upon U.S. Code, Section 1257 (3) which provides that this court may, by Writ of Certiorari, review any final judgment or decree rendered by the highest court of a state in which a decision could be had, where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Judgment of the Supreme Court of Texas sought to be reviewed is its refusal to grant a writ of error, no reversible error, which was entered on the 4th day of October, 1978.

On the 1st day of November, 1978, the Supreme Court of Texas refused to review its previous decision and overruled Petitioner's motion for rehearing and said judgment became final, R. 506, 515-17, Texas Rules of Civil Procedure.

The Supreme Court of Texas upon its refusal to review Petitioner's Application for Writ of Error was the highest court of the State in which a decision could be had in said cause; and in said cause the Petitioner specially set up and claimed a right under a statute of the United States, namely, the Federal Employers Liability Act, 45, U.S. Code, Section 51, et seq.

It is clear that the decision of the state courts under this federal statute "are not in accord with applicable decisions of this Court".

QUESTIONS PRESENTED

It is admitted by the pleadings that the Petitioner's duties as an employee of the Respondent were in furtherance of the interstate commerce transportation business of the Respondent and that both parties were at all relevant times engaged in interstate commerce and were subject to the Federal Employers Liability Act, 45 U.S. Code, Section 51 et seq.; the questions presented for review are:

1. Whether, the Petitioner, who had precious little experience in nipping ties along the Respondent's right of way, was entitled to have Respondent's negligence submitted to the jury where the Respondent required Petitioner to be upon said right of way working with a hand tool in muddy ground, and where the Respondent knew or should have known that the tool could become stuck and thus cause injury to Petitioner.
2. Whether Petitioner was entitled to have the jury weigh the Respondent's negligence where Respondent insisted that Petitioner work in a muddy area in which it was likely a hand tool would become stuck, endangering Petitioner when he attempted to extract the hand tool, and thus to use as a place of work a part of the Respondent's right of way which did not provide adequate and sufficient surface for the Petitioner to perform his job of nipping ties in a reasonably safe manner.
3. Whether the Petitioner, under the circumstanc-

es aforesaid, was entitled to have his cause submitted to a jury under evidence showing that the Respondent's method and place of work were unsafe and dangerous in that:

(a) The Petitioner was required to work a heavy tool near and into muddy ground and defective ties,

(b) The Petitioner was furnished a tool, the proper use of which required Petitioner to jab same into the muddy ground and defective ties,

(c) The Respondent did not provide the Petitioner with an alternate and drier place to work at the time in question where the lining bar would not have become stuck in the mud and defective tie.

(d) The Respondent continued to impose a duty upon Petitioner to work in the muddy area and to continue to jab the lining bar down into the muddy ground, even after its foreman had inspected the premises.

4. Whether the state courts have narrowed the concept of "proximate cause" under the Federal Employers Liability Act and have usurped the function of the jury in holding as a matter of law that the Petitioner's injury was not proximately caused by any negligence of the Respondent and that there was no evidence of negligence in failing to provide a safe place to work.

STATUTES INVOLVED

The Statutes involved are:

28 U.S. Code, Section 1257 (appendix D)
45 U.S. Code, Section 51 (appendix E)

STATEMENT OF THE CASE

Under the pleadings it was admitted that the Petitioner's duties as an employee of the Respondent were in furtherance of the interstate commerce transportation business of the Respondent and that by reason thereof the Petitioner and Respondent were at all times herein mentioned subject to the Federal Employers Liability Act, 45 U.S. Code, Section 51, et seq. Petitioner brought this suit against The Atchison, Topeka and Santa Fe Railway Company to recover damages for injuries sustained on the occasion in question in Garland, Texas through the negligence of the railroad, in failing to use ordinary care to furnish the Petitioner a reasonably safe place in which to work and in failing to supply proper tools with which to do said work and instruct in their proper use. The Petitioner at the time of injury was assigned to the task of nipping ties by means of a lining bar, which is a heavy and awkward hand tool. He was an inexperienced employee who had inadequate warning or preparation as to how to properly *extract* a lining bar if it became stuck in mud or defective ties.

The testimony regarding Respondent's failure to provide a safe place to work and the causal relationship between that failure and Petitioner's injury and damages abounds in the record. Petitioner stated that it had rained the previous night. He was directed by his foreman to work in the muddy area in question. Plaintiff further testified that the lining bar impelled itself through the bottom of a tie into the muddy ground below it. Petitioner then tried to pull the lining bar out. He tried three or four times, then all of a sudden it came out and his back popped. This "popped" back eventually resulted in major back surgery and extensive disability. It was Petitioner's opinion that the fact that he was using a lining bar had something to do with the accident occurring. He further testified that the fact that it was jammed, as it was, *caused the accident.*

As to the implication of the Respondent in this series of events, Petitioner testified that he had been instructed by his foreman that morning to nip where and as he was doing. The foreman was not in the working area to supervise or instruct very long and at the time in question had moved further down the track. There was nobody else there from the Respondent who was charged with the responsibility of looking after the safety of the workers. Petitioner's foreman, by insisting that Petitioner should continue to work in the muddy area thereby inferred that it was safe to work with such an instrument in muddy ground where railroad ties were deteriorated. It is uncontested that Petitioner was not a highly experienced railroad trackman at the time of his injury.

A fellow employee, Roy Sparks, testified by depo-

sition that the more experience a man has, the less likelihood there is of a bar getting stuck, as it did.

The Respondent called its roadmaster who testified he knew that ends of older ties are often rotted. He agreed it is likely that rotted ties are more easily penetrated with a sharp instrument. He also agreed that the more inexperienced a man is, the closer supervision he would need as a trackman.

Finally, Petitioner called a retired foreman from the Missouri and Pacific Railroad, who was of the opinion that a lining bar is dangerous for nipping and stated that he would not let his men use one for that purpose. In his expert opinion it is necessary to watch inexperienced men and caution them how to pull a stuck bar out. As a matter of fact he would only let an inexperienced man use a lining bar if he was there and showed him how not to get hurt. Referring to the "gumbo" mud that Petitioner encountered, this expert testified that the lining bar "will be the devil".

The muddy condition of the ground, the deteriorated condition of the cross tie, coupled with the use of the sharply pointed lining bar and Petitioner's inexperience, led to and caused his injury. These factors relate to the question of whether or not the work place on which Petitioner performed his nipping operation was unsafe. They would have been examined by the jury in its determination of the standard of care that should have been applied in the railroad's duty to provide a safe place to work. (The greater the risk, the greater the duty of care that is placed on the employer.)

Purportedly under the procedural requisites of Texas law, the trial court submitted the case to the jury by special issues and written instructions. The jury answered the damage issues in favor of the Petitioner and awarded substantial damages to him. Although the Petitioner requested a special issue inquiring as to the failure of Respondent to provide a reasonably safe place to work, the trial court denied Petitioner this issue. The jury found against Petitioner on the remaining negligence issues submitted. Following this jury verdict, the trial court entered judgment that Petitioner take nothing by reason of the verdict.

Thereafter the Respondent's motion for new trial was overruled. The Respondent appealed to the Court of Civil Appeals of the Second Supreme Judicial District sitting in Fort Worth, Texas who affirmed the judgment of the trial court. Appeal was then duly taken to the Supreme Court of the State of Texas which refused both the Application for Writ of Error, and subsequent Application for Rehearing.

REASONS FOR GRANTING THE WRIT

1. The state court by its decision and judgment in this cause, denied Petitioner a right specially set up and claimed by him under the Federal Employers Liability Act, namely, the right to have his case submitted to a jury on the theory that the Petitioner, while employed by Respondent in interstate commerce was injured as a result of the negligence of the Respondent in failing to use ordinary care to furnish

the Petitioner a reasonably safe place in which to work.

The judgment of the state court, if permitted to stand, will deprive this Petitioner of his fundamental right of trial by a jury of his peers. We see that state courts, under the color of local practice, sometimes disregard the clear pronouncements of this court that a trial court must submit all claimed issues of negligence to a jury whenever the facts establishing negligence are in dispute. Under such circumstances the jury must be free to believe or disbelieve whatever facts it chooses despite the very real probability that the court might reach an opposing conclusion or feel that another inference or conclusion is more reasonable. Our jury system can only work with the fundamental belief that the jury has the right to be wrong, within reasonable bounds. The state court usurps that functioning of a jury whenever it fails or refuses to submit a claimed, disputed issue of negligence, under the color of state procedural rules.

Under the Federal Employers Liability Act, the concept of "proximate cause" takes on special meaning. The Act assesses liability against the employer for *any* negligence, even though some other factor may logically be said to be much more influential in bringing about the injury.

ARGUMENT SUPPORTING THE REASONS FOR GRANTING THE WRIT

Of fundamental importance is the basic concept that Respondent owed Petitioner the duty to use ordinary care to furnish Petitioner a reasonably safe place to work. This duty is continuing and the Respondent is not relieved of its obligation because Petitioner's work at that place and by the manner in question may have been fleeting or infrequent. *Bailey v. Central Vermont Ry.*, 319 U.S. 350 at 353 (1943).

The mere fact that Petitioner performs a task not of daily routine in conditions that are changing does not lessen the standard of care which is applied to Respondent. The courts below apparently believe that there was no proof that such an accident and injury could have been reasonably foreseen from the way in which the work Petitioner did was directed by Respondent. The Courts further held by implication that there was no evidence that Petitioner's injury was caused by the method approved and adopted by Respondent to nip ties in such conditions, or that such an injury or danger could reasonably have been foreseen by reason of the way Petitioner was expected to nip ties. In the face of the overwhelming evidence in the record these contentions are incorrect. The record is clear that Respondent did nothing before Petitioner got hurt to anticipate or avoid the likelihood of Petitioner's injury, although the Respondent was under a continuing duty to do so. Had Respondent given reasonable thought and care in the matter:

1. It would not have insisted that the inexperi-

enced Petitioner continue to work in muddy ground where there were deteriorated ties, with either a lining bar or claw bar.

2. It would have provided a reasonably safe and dry area for Petitioner to work while the area in question was drying, or instructed Petitioner in the proper means of extracting a jammed hand tool.

Respondent's lack of care in this respect cannot be reconciled with the basic concept of prudence and caution. If Respondent's foreman insisted upon the unnecessary exposure to such dangerous condition, then he should have warned the Petitioner of the particular dangers involved and how he could have prevented injury. Given the facts in this record injury was inevitable. Accordingly, Petitioner's requested issues of negligence should have been submitted to the triers of fact.

> "(T)hese were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing (the petitioner) with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury" *Bailey v. Central Vermont Ry.*, 350 U.S. 319 at 353 (1943).

The state court committed error and usurped the function of the jury when it refused to submit the safe place to work issues, as requested by Petitioner.

The question of such negligence was clearly plead and proved by Petitioner and was hotly contested by Respondent at trial. Had the jury merely been given the opportunity to weigh that evidence, it might have found those issues in favor of the Petitioner. Of course, it might have determined the opposite, just as easily. The error in this cause is not that the jury was right or wrong, but that the jury was never given the opportunity to judge the facts for itself. This error amounts to a clear denial to this Petitioner of his fundamental right of trial by jury. This Court has made it abundantly clear that any action of a trial court or appellate court in removing a case from the consideration of the jury in "close or doubtful" cases does violence to the constitutional right under the federal constitution of an injured railroad employee to trial by jury. See, e.g., *Bailey v. Central Vermont Ry.*, 350 U.S. 319 at 354 (1943). Fact finding is the sole province of the jury.

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable . . . That con-

> clusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because the Judges feel that other results are more reasonable." *Tennant, Admx. v. Peoria & P.U. Railway Co.*, 321 U.S. 29, 35 (1944)

This court has stressed these same principles time and again. As Mr. Justice Black said in *Wilkerson v. McCarthy, et al*, (1949) 336 U.S. 53 at 55:

> "This Court has previously held in many cases that where jury trials are required, courts *must* submit the issues of negligence to a jury if evidence *might* justify a finding either way on those issues . . . It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case." (emphasis added)
>
> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to a jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given." 336 U.S. at 57.

In *Rogers v. Missouri Pacific R. Co.*, 353 U.S. 500, 506 (1957) the court reiterated the clear standard of what constitutes a jury case:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played

> any part, even the slightest, in producing the injury or death for which damages are sought."

It has been argued that the question is still open as to what the court meant when adopting the so called "Rule of Reason". But, in *Lavender v. Kurn*, 327 U.S. 645, 653 (1946), the Court had already stated:

> "Whenever facts are in dispute or the evidence is such that fair-minded men may draw difference inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference."

The jury in the instant cause could well have concluded that there was no logical reason for Petitioner to be required to work in the area where he was at the time in issue since the ground was muddy, the ties were deteriorated, and there was work of a different nature to be done in other areas. There is no conjecture involved in that conclusion or inference.

In the case at bar the state court disposed of the most vital issue, to-wit: whether the Respondent exercised ordinary care to furnish the Petitioner a reasonably safe place in which to work, simply by holding that the submission of the safe hand tool issues adequately presented Petitioner's theories to the jury. Such a simplistic analysis of the issues involved is improper and unjustified. The state court ignores all of the other facts and circumstances in evidence. Petitioner was an inexperienced employee who was told to nip ties in an area made hazardous by mud and deteriorated ties. His use of either of the hand tools

available to him combined with the physical conditions of the area in which he was working would lead to the inevitable jamming of the hand tool into the mud and tie. Petitioner did not know the dangers that attached to this work and had received no warning or other preparation or instruction in the proper means of using such a hand tool in such hazardous conditions or the method of extracting a jammed tool from such a position. While following the limited instructions that he was given, he was injured while performing the tasks that were assigned to him. The injury stems from three factors relative to Respondent's failure to furnish Petitioner a reasonably safe place in which to work:

1. Respondent's demand that the inexperienced Petitioner stand and work in muddy ground while using hand tools that could become stuck;
2. The failure of the Respondent to provide a reasonably safe and dry area in which to work while the area in question was drying, and,
3. The failure of the Respondent to instruct Petitioner in the proper means of extracting a jammed hand tool.

It is inaccurate to characterize the trial court's issue submission as a proper and complete recapitulation of Petitioner's theories of liability. Approval of this action allows a restrictive and impermissible definition of "negligence" to apply in FELA actions. But in the context of such actions, "negligence" must necessarily be that action or omission which is, in the

eyes of unfettered, but reasonable jurors, inconsistent with the duty of care and prudence.

> "Negligence under the Federal Employers' Liability Act is such an illusive and fragmentary thing as to defy definition. Attempts to do so usually compound the confusion. It is almost practical to characterize it as that indefinable something that is present when the jury finds for the claimant and likely to be there if contrary finding results." *Southern Ry. v. Wood*, 171 So.2d 614 (Fla. 1965)

What constitutes a reasonably safe place to work is not governed by states rules of law in any event. *Griswold v. Gardner*, 155 F.2d 333 (6th Cir. 1946, Cert. den. 329 U.S. 725.)

To say simply that the hand tools in question may or may not have been dangerous in themselves under these circumstances and to submit those as the only issues of negligence for the jury to determine is to ignore the totality of circumstances. It is unrealistic and illogical to believe that an issue of the properness of hand tools captures the entire content of a different and more general question of whether the conditions existing at the particular location and at the time in issue might be unsafe for Petitioner to perform his duties. Nor are the specific tool questions mere gradations or shades of the broader issue. It was imperative under the facts of this case that the trial court submit all of Petitioner's requested issues.

THE STATE COURT NARROWED THE CONCEPT OF PROXIMATE CAUSE UNDER THE FEDERAL EMPLOYERS LIABILITY ACT

The FELA does not purport to narrow or broaden a purely logical exercise of determining the cause or causes of injury. Rather, it directs its eye toward the assessment of liability for the injury. Logic may conclude that the injury resulted from a combination of one or more of the following: negligence of the employer, the employee's negligence, the foreseeable acts of a third party, an Act of God, or pure accident (no negligence.) But after the identification of causation in fact, the statute mandates that if there is any negligence on the part of the employer, no matter how little, liability shall attach, regardless of any other causal factors. Petitioner strongly urges that the state court's conclusion that Respondent was free of negligence or that its negligence was not the cause of the Petitioner's injuries, was invalid under the evidence and under the applicable standard of "proximate cause". Certainly, a jury of fair-minded men should be permitted to find under the statute that Respondent was negligent and that said negligence contributed "in part" to cause Petitioner's injuries.

PRAYER

For the reasons herein given, Petitioner prays for a Writ of Certiorari directed to the Supreme Court of Texas to review the judgment of that court, along with the judgments of the courts below and that such judgments be reversed with directions that the Petitioner herein be granted a new trial.

Respectfully submitted,

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By: Lowell E. Dushman
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APPENDIX A

NO. 213-30267-75

IN THE DISTRICT COURT OF TARRANT
COUNTY, TEXAS
153RD JUDICIAL COURT

VIRGIL P. MILLER

V.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY

JUDGMENT

On the 21st day of June, 1977, came on to be heard the above entitled and numbered cause where in VIRGIL P. MILLER is the Plaintiff and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY is Defendant; on said date the said parties announced ready for trial and came a jury of twelve good and lawful men and women, who being duly impaneled and sworn and having heard the pleadings, the evidence, the Charge of the Court and argument of counsel, returned their verdict in response to special issues, definitions and explanatory instructions submitted to them by the Court on the 28th day of June, 1977, which verdict was received by the Court and was filed and entered of record on the minutes of such court; and the Defendant, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, having made a motion for judgment and the Court being of the opinion that judgment should be rendered for the Defendant, THE

ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY;

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that Plaintiff, VIRGIL P. MILLER, take nothing by his suit, and that the Defendant, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, have judgment on the verdict against Plaintiff, and recover from said Plaintiff its costs, for which let execution issue, of which action, Plaintiff gave notice of his intent to appeal.

SIGNED this.....day of....., 1977.

/s/ Ardell Young
Ardell Young
JUDGE

APPROVED AS TO FORM:

DUSHMAN, GREENSPAN & FRIEDMAN
By */s/ Lowell E. Dushman*
Lowell E. Dushman

HUDSON, KELTNER, SMITH,
CUNNINGHAM & PAYNE
By */s/ Joe Bruce Cunningham*
Joe Bruce Cunningham

APPENDIX B

From the District Court of Tarrant County
(No. 153-30267-75)

June 22, 1978

Opinion by Chief Justice Massey

Virgil P. Miller
17989

vs.

The Atchison, Topeka and Santa Fe
Railway Company

This cause came on to be heard on the transcript of the record and the same having been reviewed it is the opinion of the Court that there was no error in the judgment. It is therefore ordered, adjudged and decreed that the judgment of the court in this cause be and it is hereby affirmed.

It is further ordered that appellant, Virgil P. Miller, and his sureties, Lowell E. Dushman and Jack Friedman, pay all costs in this behalf expended, for which let execution issue, and that this decision be certified below for observance.

NO. 17989

IN THE COURT OF CIVIL APPEALS FOR THE
SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

VIRGIL P. MILLER APPELLANT

vs.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY APPELLEE

FROM THE DISTRICT COURT OF
TARRANT COUNTY

OPINION

F.E.L.A. case brought by plaintiff Virgil P. Miller against defendant Atchison, Topeka and Santa Fe Railway Company under U.S.C.A. Title 45, "Railroads," Ch. 2, "Liability for Injuries to Employees," § 51, "Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees."

From a judgment that Miller take nothing by his suit, based upon a jury verdict, he appealed.

We affirm.

By the verdict Miller did sustain injury while at work for the Santa Fe on 23 October 1972. The jury, by answers to Miller's own special issues, refused to find the Santa Fe to have been negligent in either the failure to exercise ordinary care to make available a

claw bar for Miller's use in "nipping the crosstie," or in any failure to exercise ordinary care to instruct him in the proper use of a lining bar.

Despite timely request therefor by Miller the trial court refused to submit special issues inquiring whether, upon the occasion in question, the Santa Fe failed to furnish him with a reasonably safe place to work, and whether such failure, if any, was a cause in whole or in part of his injuries.

The refusal to submit such specially requested issues was because of the trial court's conclusion that there was no evidence of probative force and effect which raised as an issue whether there was a failure on the part of the Santa Fe to furnish Miller with a reasonably safe place to work and/or that any such failure, if any there was, amounted to a cause in whole or in part of his injuries, or of the event whereby such injuries were sustained.

In this we agree with the trial court. Miller's issues were not raised by the evidence.

"Nipping a crosstie" was the activity in which Miller was engaged when he sustained an injury to his back. What this means is lifting the end of a crosstie supporting a railroad track in order for the adjustment and placing of ballast material under it so as to raise or secure the level of the track by which it is supported. A properly maintained railroad track is one on which a passing train will be even, level and stable so that whatever is being transported will more surely arrive at the proper destination in an undamaged condition.

Miller was using what is called a "lining bar" as a lever to raise the end of the crosstie rather than a "claw bar". The jury found that he failed to use ordinare care to obtain a claw bar in raising the end of the crosstie while at the same time it refused to find (for Santa Fe) that such failure was a cause, in whole or in part, of the injuries he sustained. As previously noticed the jury refused to find the Santa Fe negligent either in any failure to make available a claw bar or in any failure to instruct Miller in the proper use of a lining bar.

In his use of the lining bar, a heavy iron bar with a wedge-like reinforced tip, Miller would place the bar over a fulcrum which was a "4 by 4 piece of wood block". The reinforced tip of the bar would be inserted under the end of the crosstie and by use of the fulcrum the free end of the bar would be forced downward and the crosstie thereby lifted so that ballast material could be adjusted or placed thereunder.

This was the operation performed by Miller on the occasion in question as applied to the end of a particular crosstie under which he had inserted the end of the lining bar. Such operation was completed except for the removal of the bar after it was ceased to be used as a lever so that the end of the crosstie was released and lowered so that it rested on the ballast. Miller attempted to pull the lining bar free of the crosstie only to find that to do so was unusually difficult. There had been a deterioration in the material of the crosstie at the end lifted. By reason of this defect in the crosstie the pressure exerted thereon

by the lining bar caused the end of the bar to be caught in the crosstie as the result of having sunk into the body thereof. Miller was successful in wrenching the lining bar free, but in so doing he twisted and wrenched his back so that he sustained the injury because of which he brought suit.

Miller, in addition to the other theories by reason of which he sought to have the Santa Fe found negligent by the special issues which were submitted because he desired them, also insisted there be submitted the questions upon Santa Fe's negligent failure to furnish him a safe place to work in order that, in the event he could obtain favorable jury findings relative to the "unsafe place to work" theory, he would be entitled to prevail by his suit. The trial court refused to submit the issues because it concluded Miller was not entitled to them. We hold the trial court did not err.

Actually, what we have factually stated above is substantially the whole of the evidence upon which there was reliance by Miller in his insistence upon entitlement to have the requested issues submitted. On direct examination there were two questions posed and answers thereto returned by Miller relative to anything other than and in addition, viz:

"Q. Had it been raining the night before? How was the ground?
"A. Yes. It had been raining the night before.
"Q. Okay. How was the ground
"A. It was muddy."

There was nothing more. Nothing connected with

the condition of the ground, or any place Miller might have found it necessary to stand or support himself at any material time, was in any way identified as having been connected with, or having played any part of, the events, giving rise to his injuries.

Miller contends that under all the circumstances the issue upon safe place to work was raised; that the trial court erred in refusing to submit them to the jury in compliance with his request.

While we do not think it applicable to our case we take occasion to state that we are conscious of the decision in *Arnold v. Panhandle & S. F. R. Co.*, 353 U.S. 360, 77 S.Ct. 840, 1 L. Ed. 2d 889 (1957). The Supreme Court of the United States granted certiorari and held relative to a case where both the general issue on safe place to work and also what the court of civil appeals thought to be the controlling specific issues covering all the elements of that same question were submitted, and where findings on the latter were no favor of the defendant while on the general issue were for the plaintiff (see 283 S.W.2d 303 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.)) that in F.E.L.A. cases the general finding should control. In part the opinion, on certiorari reads:

> "The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based. Hence all of the findings in the case might well be true insofar as the record indicates. The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are

> fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness, for '. . . the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.' "

While we are convinced that there was no evidence which raised the question upon whether there was anything unsafe existent we nevertheless have proceeded to consider the state of the record on the hypothesis that our conclusion might be erroneous and that the whole of the circumstances might have raised an issue of whether there was failure on the part of the Santa Fe to furnish Miller a safe place to work. Having done so we have reached the conclusion that there was utter failure of the evidence to raise as an issue for the jury any question of a causal connection of the unsafe place, assumed as existent, to Miller's injuries. In other words: assuming that Miller was not furnished a safe place to work that fact was not proved to have been, either in whole or in part, a cause of the event or of Miller's injuries therefrom resultant.

There is complaint of the submission and/or form of submission of special issues, or as applied to answers returned thereto, in connection with injury upon the matter of contributory negligence of Miller by reason of his failure to keep a proper lookout, and likewise as applied to the special issues on his damages and expenses. Although these complaints are overruled for additional reasons it is obvious that they are immaterial in view of our holding relative to pro-

priety of the court's refusal to submit issues upon safe place to work, coupled with the failure of Miller to obtain any favorable answer to his liability issues which were submitted. They are overruled for that reason.

Thus the questions on appeal are reduced to those upon whether there occurred error requiring reversal because the Santa Fe was permitted (a) to prove what Miller calls his remote criminal conviction; (b) to prove his failure to file income tax returns; (c) in the denial of right by Miller to show that his witness Devaney's testimony was contrary to a written statement previously made; and (d) because of the remarks by the attorney for Santa Fe casting improper reflection upon Miller's attorney and upon the qualifications of Miller's expert witness.

We take occasion to remark at the outset that even with an assumption that errors were made we do not find that the errors amounted to reversible error by the test of TEX. R. CIV. P. 434, the Texas "Harmless Error" rule. To constitute reversible error as applied to matters considered the error must be found to have been such as was reasonably calculated to cause and furthermore probably did cause the jury to return a verdict other than that which it did return. We do, however, consider the points proper to be overruled for additional reasons to be stated.

During the cross-examination of Miller he admitted that he had not filed federal income tax returns for the year of 1969 through 1972 or at any other time. The objection of Miller's attorney to admission of this

evidence was that it was immaterial and irrelevant and designed to elicit prejudicial information with an intent to inflame and prejudice the jury against Miller. The objection also pointed out that the Santa Fe could prove the proper amount of damages by information from records of Miller's former employers.

Miller's income tax returns, had there been any, would have constituted evidence tending to show relevant factors upon loss of his earning capacity as result of his injuries. 17 TEX. JUR. 2d p. 330, "Damages", § 266, "Earnings before and after injury". Miller's own evidence proved only that in the 9 to 10 years prior to his injury he had worked for almost 20 different employers, though he had no idea how many different employers there were for whom he had worked or how much money he had earned in any of the preceding years. Income tax returns of a plaintiff are material and relevant to show impairment of earning capacity where the question exists, as it did in this case. By the same rules the absence of any returns would have relevancy. To show the fact might have been prejudicial to Miller in the minds of the jury but because such would be true yet it would not be a reason to hold the evidence inadmissible. Indeed, it would have been improper to exclude the evidence.

In March-April, 1970, Miller had been convicted of the crime of theft from a person, a felony, and he was assessed a 5-year probated sentence, which was completed in March-April of 1973. It was in October of 1972 that Miller sustained his injuries while at work for Santa Fe. Under these circumstances perhaps the

trial court would have erred had it denied Santa Fe the right to prove Miiler's prior conviction. Certainly the conviction was not so remote from the time of trial (which began June 21, 1977), as to constitute the proof upon it an abuse of discretion on the part of the trial court. It would be reversible error to allow the proof only if it amounted to an abuse of discretion. *Landry v. Travelers Insurance Company*, 458 S.W.2d 649 (Tex. 1970); 25 Sw. L.J. 135 (1971), Elliott, "Procedural law — Evidence", in § I, "Impeachment by Prior Conviction".

Miller presented the witness Devaney, who testified that he had no recollection that Miller had made the statement that he had injured his back, though conceding that he heard Miller complain that his back bothered him. Miller's attorney handed the witness a former written statement he had signed for the purpose of refreshing his recollection. Despite Devaney's examination of the statement for this purpose he persisted in his statement that he had no recollection of having heard Miller say that he had been injured. (To be remembered is that the jury found that Miller had injured his back.) The court denied Miller the right to impeach Devaney by the written statement. Here the testimony of Devaney, though disappointing to Miller, did not disprove his case. Under these circumstances no basis for permitting Devaney's impeachment existed. The court did not err in refusing Miller's request. *Morgan v. Stringer*, 120 Tex. 220, 36 S.W.2d 468 (Tex. Comm'n App. 1931, opinion adopted), answering questions certified.

The expert witness tendered by Miller was a Dr. Dryden, a human factors engineer. By him it was shown that the most probable response or reaction of one who had not had any prior instruction upon procedure and who was similarly situated as was Miller (upon finding that the lining bar had become stuck in the end of the crosstie) would have been the same as that of Miller upon the occasion in question.

What is complained about by Miller is the mode of the Santa Fe attorney's objection to the expert's testimony, and, when his objection was overruled, to the side-bar remarks made by him. The record does substantiate the complaints made. That an objection by the Santa Fe attorney was overruled does not foreclose further objection when the opposing counsel proceeds with another question; it was this rather than a side-bar remark that we have for consideration. Furthermore, an objection which might include the assertion that the witness does not know what he is talking about is no more than a part of a proper objection that there is lack of qualification for the reception of testimony sought to be elicited. That of which Miller complains to have been a reflection upon his attorney consisted in matter which by the Santa Fe was insisted to be improper questioning of the witness by Miller's attorney. The particular objection was sustained by the trial court; and the trial court at the same time sustained Miller's objection of the side-bar remark of the Santa Fe counsel. The court instructed the jury that it should not consider such remark by Santa Fe's attorney (which, essentially, was the often heard statement that opposing counsel "knows bet-

ter"). Prejudice, if any, existent under the circumstances, was cured by the instruction. 56 TEX. JUR. 2d p. 684, et seq. "Trial", Sec. 323, (Instructions to Disregard Argument)—In general" and § 324, "Necessity of request for instruction".

All points of error are overruled, and the judgment is affirmed.

/s/ *Frank A. Massey,*
Frank A. Massey,
CHIEF JUSTICE.

NOT FOR PUBLICATION
TEX. R. CIV. P. 452
JUN 22 1978

APPENDIX C

Clerk, Supreme Court of Texas
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OFFICIAL BUSINESS
STATE OF TEXAS

State Penalty (Oct. 4, 1978)
For Private Use

This Side of Card is for Address

Mr. Lowell E. Dushman, Attorney
820 Commerce Building
Fort Worth, Texas 76102

CLERK'S OFFICE—SUPREME COURT

Austin, Texas Oct. 4, 1978

Dear Sir:

You are hereby notified that the Application for Writ of Error in the case of MILLER v. ATCHISON, TOPEKA & SANTA FE RY CO., No. B-7868, was this day refused. No reversible error.

Very truly yours,

GARSON R. JACKSON, Clerk

Clerk, Supreme Court of Texas
Box 12248, Capitol Station [10¢ Postage Meter]
Austin, Texas 78711

OFFICIAL BUSINESS
STATE OF TEXAS

State Penalty (Nov. 1, 1978)
For Private Use

This Side of Card is for Address

Mr. Lowell E. Dushman, Attorney
820 Commerce Building
Fort Worth, Texas 76102

CLERK'S OFFICE—SUPREME COURT

Austin, Texas Nov. 1, 1978

Dear Sir:

You are hereby notified that the Motion for Rehearing in the case of MILLER v. ATCHISON, TOPEKA AND SANTA FE RY CO., No. B-7868 was this day overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

APPENDIX D

28 U.S. Code § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX E

45 U.S. Code § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

No. 78-1187

IN THE

SUPREME COURT OF THE UNITED STATES

VIRGIL P. MILLER, *Petitioner*

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, *Respondent*

Respondent's Reply to Petition for Writ of Certiorari

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INDEX

	Page
Index	i
List of Authorities	ii
Question Presented	1
Jurisdiction	2
Statement of the Case	3
Argument and Authorities	4
Conclusion	9
Prayer	10
Certificate	11

LIST OF AUTHORITIES

Page

B

Black v. Cutter Laboratories, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824 2

Brinkley v. Pennsylvania R. Co., 358 U.S. 865, 3 L.Ed.2d 97, 79 S.Ct. 94 2

Burch v. Reading Co., 353 U.S. 965, 1 L.Ed.2d 914, 77 S.Ct. 1049 2

D

Daulton v. Southern Pacific Co., 352 U.S. 1005, 1 L.Ed.2d 549, 77 S.Ct. 564 2

H

Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140 2

R

Robinson v. G.C. & S.F. Ry. Co., 325 S.W.2d 432, (Tex.Civ.App.—Fort Worth 1959, wr.ref'd), cert. denied 362 U.S. 919, 4 L.Ed.2d 739, 80 S.Ct. 672 ..... 2, 5, 6

Rogers v. Missouri-Pacific R.R.Co., 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443 9

W

Webb v. Illinois Central RR. Co., 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 451 9-10

Wilkerson v. McCarthy, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413 9

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Respondent's Reply to Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes The Atchison, Topeka and Santa Fe Railway Company, Respondent in the above entitled and numbered cause, hereinafter called Respondent, and files this its reply to the Petition For Writ Of Certiorari of Virgil P. Miller, hereinafter called Petitioner, and for such reply would respectfully show the Court the following:

QUESTION PRESENTED

The sole issue in this case is whether the global issue of "safe place to work" must be submitted to the jury in every Federal Employers Liability Act case irrespective of the other issues of negligence submitted to the jury.

JURISDICTION

Respondent denies that this Court has jurisdiction to review the final judgment of the Supreme Court of Texas in this case. The only issue presented to the Supreme Court of Texas was whether the state trial court erred in refusing to submit to the jury the safe place to work issues requested by Petitioner and this certainly does not raise a question of any "title, right, privilege or immunity" under any statutes or the Constitution of the United States. See *Daulton v. Southern Pacific Co.*, 352 U.S. 1005, 1 L.Ed.2d 549, 77 S.Ct. 564; *Burch v. Reading Co.*, 353 U.S. 965, 1 L.Ed.2d 914, 77 S.Ct. 1049; *Brinkley v. Pennsylvania R. Co.*, 358 U.S. 865, 3 L.Ed.2d 97, 79 S.Ct. 94; *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140 and *Black v. Cutter Laboratories*, 351 U.S. 292, 100 L.Ed. 1188, 76 S.Ct. 824.

In addition, this Court by Rule 19, Supreme Court Rules, has stated that a review on writ of certiorari is not a matter of right and will be granted only where there are special and important reasons therefor. The method of the trial court's submission of negligence certainly does not fit into that category. Furthermore, this identical issue has been decided by this Court in *Robinson v. G.C. & S.F. Ry. Co.*, 325 S.W.2d 432 (Tex. Civ.App.—Fort Worth 1959, wr.ref'd), cert. denied 362 U.S. 919, 4 L.Ed.2d 739, 80 S.Ct. 672 and Petitioner has failed to cite a single case which is in conflict with the holding in that case.

STATEMENT OF THE CASE

This is a simple case brought by the Petitioner under the Federal Employers Liability Act in which Petitioner claimed that he had been injured while nipping (raising) crossties with a lining bar so that ballast could be placed under the crossties. It was the contention of Petitioner that he had been furnished a lining bar rather than a claw bar (which had a bent end) to nip ties, that he had not been instructed as to the use of a lining bar for this purpose and that as a result he stuck the lining bar through the bottom of a crosstie into the ground causing an injury when he tried to remove the lining bar. In support of this position, Petitioner called two experts to testify and both of those experts testified that a claw bar rather than a lining bar should be used for the job that Plaintiff was performing.

It is obvious that the trial court listened very carefully to the evidence presented because those are exactly the issues submitted by the trial court to the jury as follows:

> "Special Issue No. 1:
>
> "Do you find from a preponderance of the evidence that the defendant:
>
> "(a) On the occasion in question failed to exercise ordinary care to make available a claw bar for plaintiff's use in nipping the crosstie?
>
> Answer: We do not.
>
> "(b) Prior to or on the occasion in question failed to exercise ordinary care to instruct

the plaintiff in the proper use of a lining bar?

Answer: We do not."

By the testimony of Petitioner himself, these acts were the only cause of the accident. In fact, Petitioner filled out an accident report in which he stated that there was no defect in the place where he was working which caused the accident.

ARGUMENT AND AUTHORITIES

Petitioner is apparently confused by the distinction between the duty owed by a railroad to its employees and the method of submission to the jury of a violation of that duty. Undoubtedly, a railroad or any other employer has a duty to furnish to its employees a reasonably safe place to work. However, under Texas procedure, the method of submitting to the jury the question of whether this duty has been violated is by special issue and Rule 279, Texas Rules of Civil Procedure, specifically provides the following:

> "Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue."

The trial court in this case submitted the only issues of negligence raised by the evidence against Respondent and the jury found against Petitioner on those issues.

Petitioner now contends that the trial court erred in

refusing to submit the general safe place to work issues requested by Petitioner. Petitioner cites no case which holds that it is error and ignores the only Texas case to our knowledge which has decided this issue. This issue was decided in the case of *Robinson v. G.C. & S.F. Ry. Co., supra.* In the *Robinson* case, the plaintiff alleged many specific acts of negligence on the part of the railroad company, together with the general allegation of safe place to work. The trial court submitted numerous special issues relating to each specific act of negligence which had been plead by the plaintiff and on which some evidence had been produced. The trial court refused to submit the general issue of safe place to work. The jury answered each of the special issues adversely to plaintiff and the trial court entered judgment for the defendant railroad. On appeal, the Fort Worth Court of Civil Appeals identified the precise question of the case as being "whether the trial court adequately presented plaintiff's case to the jury." (325 S.W.2d at 435). The court held that, since the specific issues submitted did include all the grounds on which a finding of unsafe place to work could be based, there was no error in refusing to submit the requested issue, using the following language:

> "We do not intend to hold, and do not hold, that it is improper in a F.E.L.A. case to submit a general issue on unsafe place to work and special issues on specific acts or omissions. We merely hold, under the whole record in the case before us, that the trial court did not deprive plaintiff of any substantive right by refusing to submit the general issue of unsafe place to work, having concluded that the special issues properly and

adequately presented all plaintiff's grounds on which there was evidence of unsafe place to work to the jury."

In the *Robinson* case, the Supreme Court of Texas also refused an application for writ of error. Also, a petition for writ of certiorari was filed in this Court and was denied at 4 L.Ed.2d 739. If this Court will examine the petition for writ of certiorari filed in this Court in the *Robinson* case, the Court will find that the identical issue was presented and by denying the petition for writ of certiorari, this Court held that the general issue of safe place to work does not need to be submitted to the jury where the special issues submitted do properly and adequately present all of the plaintiff's grounds on which there was evidence of unsafe place to work.

In order for this Court to determine whether or not the trial court adequately presented Petitioner's case to the jury, it would be necessary for the Court to examine the Statement of Facts but it cannot do so since Petitioner has failed to bring forth the record to this Court. However, we should point out that three courts, the trial court, Fort Worth Court of Civil Appeals and the Supreme Court of Texas, have examined such record and have concluded that the special issues submitted by the trial court to the jury did properly and adequately present all of Petitioner's grounds on which there was evidence of unsafe place to work to the jury.

Petitioner in his Petition For Writ Of Certiorari in this Court seems to take the position that additional

issues of negligence were raised by proof that Petitioner was required to work around mud and a deteriorated crosstie. No witness, including the Petitioner, testified that the Respondent was negligent in having Petitioner work around mud or a deteriorated crosstie or that the mud or deteriorated crosstie caused the accident in question. These conditions were mentioned by Petitioner only in connection with his contention that the lining bar wouldn't have gotten stuck if he had been furnished with a claw bar rather than a lining bar. Certainly there was no evidence that Respondent was negligent in having Petitioner work when the ground was wet or around crossties which could be pierced when struck by a heavy steel bar. Even the experts of Petitioner made no such contention and they would have been laughed out of court by the jury if they had done so. A fair reading of the Statement of Facts shows that the only issues of negligence were that of furnishing a lining bar rather than a claw bar and in failing to properly instruct Petitioner on the use of the lining bar. Evidence was submitted by Petitioner on these issues and these issues were submitted to the jury but found adversely to Petitioner. The submission of the global issue of safe place to work would have permitted the jury to speculate about matters on which there were no pleadings or evidence and any favorable finding to Petitioner clearly would have been without any support in the evidence.

None of the cases cited by Petitioner are in point as none hold that it is error for a trial court to refuse

to submit to the jury the issue of safe place to work where issues of specific acts of negligence have been fairly submitted to the jury. All of the cases cited by Petitioner on pp. 11 through 17 of his Petition For Writ Of Certiorari involve cases where the court determined the standard of proof necessary to support a finding of negligence by the jury. In each of such cases, a finding of negligence by the jury had been set aside by the court so that the only issue was how much evidence was sufficient to support a finding of negligence by the jury.

One other contention of Petitioner needs to be discussed and that is the statement on p. 18 to the effect that the state court in this case has narrowed the concept of proximate cause under the Federal Employers Liability Act. This argument makes no sense at all as none of the Texas courts have concluded that Respondent was free of negligence or that its negligence was not the cause of Petitioner's injuries. The jury rather than the courts decided that Respondent was free of negligence. Of course, the jury did not reach the causation issues with regard to the negligence of Respondent since they failed to find any negligence, but such issue was as follows:

"Special Issue No. 2:

"Do you find from a preponderance of the evidence that such act or omission of the defendant was a cause, in whole or in part, of the injuries, if any, sustained by the plaintiff on the occasion in question with respect to:

"(a) Failure to exercise ordinary care to make

available a claw bar for plaintiff's use?

Answer: .....

"(b) Failure to exercise ordinary care to instruct plaintiff in the proper use of a lining bar?

Answer: ....."

The trial court submitted to the jury the causation issue in the traditional manner following the mandate of this Court in *Rogers v. Missouri-Pacific RR. Co.*, 352 U.S. 500, 1 L.Ed.2d 493, 77 S.Ct. 443.

CONCLUSION

Petitioner's repeated statements that he was deprived of a jury trial are not true. This is not an instance where the trial court took the case from the jury or where a verdict was overturned on appeal. The trial court submitted all issues supported by the pleadings and the evidence to the jury and the jury resolved the essential negligence issue against the Petitioner. Petitioner has clearly had his jury trial and he has not been denied any substantive right.

There is no way to construe the opinions of this Court in the last several years other than as saying and holding that the jury verdict in F.E.L.A. cases must be accorded finality. For instance, see *Wilkerson v. McCarthy*, 336 U.S. 53, 93 L.Ed. 497, 69 S.Ct. 413. This Court also has said many times that the finality of a jury verdict in an F.E.L.A. case should not be disturbed for unsubstantial errors in procedure. *Rogers v. Missouri-Pacific RR. Co., supra*, and *Webb*

v. Illinois Central RR. Co., 352 U.S. 512, 1 L.Ed.2d 503, 77 S.Ct. 451.

The only thing unusual about this case is that a railroad won a F.E.L.A. case before a jury and surely this is not grounds for reversal. Certainly if the jury verdict had been for the Petitioner in this case and the Respondent had presented the same error, or the same type of error, seeking a reversal and a new trial, this Court would certainly not even consider a petition for writ of certiorari on such grounds.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the petition for writ of certiorari be denied.

Respectfully submitted,

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2300 Fort Worth Nat'l. Bank Bldg.
Fort Worth, Texas 76102
Attorneys for Respondent

Of Counsel:

Luther Hudson

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent's Reply to Petition for Writ of Certiorari has been mailed on the 26th day of February, 1979, to Lowell E. Dushman, Dushman, Greenspan, Friedman & Gray, 920 Commerce Building, Fort Worth, Texas 76102, attorneys for Petitioner.

Luther Hudson